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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

BARBARO TECHNOLOGIES, LLC.

Case No. 3:18-cv-02955-RS

Plaintiff:

Plaintiff.

V

NIANTIC INC

**NOTICE OF MOTION AND MOTION FOR
LEAVE TO FILE MOTION FOR
RECONSIDERATION OF COURT'S
ORDER GRANTING MOTION FOR
JUDGMENT ON THE PLEADINGS**

Defendant.

**NOTICE OF MOTION AND MOTION FOR
LEAVE TO FILE MOTION FOR RECONSIDERATION OF COURT'S ORDER
GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS**

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

5 PLEASE TAKE NOTICE that pursuant to Northern District of California Civil Local Rule
6 7-9(b)(3), Barbaro hereby moves this Court for an order granting it leave to file a motion for
7 reconsideration of this Court's May 21, 2020 Order Granting Motion for Judgment on the Pleadings
8 ("Order"). As required by Civil Local Rule 7-9 of the U.S. District Court for the Northern District
9 of California, Barbaro respectfully contends, as discussed more fully below, that the Order reflects
10 "[a] manifest failure by the Court to consider material facts or dispositive legal arguments which
11 were presented to the Court before such interlocutory order."

MEMORANDUM OF POINTS AND AUTHORITIES

13 Barbaro seeks leave to move for reconsideration of the Order because the Court
14 oversimplified the asserted claims of the ‘325 Patent in finding that they (1) are directed to an
15 abstract idea, and (2) fail to present an inventive concept. Although Barbaro disagrees with both of
16 the Court’s conclusions, it seeks leave to file a motion for reconsideration only with respect to the
17 Court’s finding that the ‘325 Patent fails to present an inventive concept. In that part of its Order,
18 the Court not only reduced the asserted claims to a simplistic concept, but also--based on a miscue
19 caused by a new argument raised in Niantic’s Reply--unduly reduced Barbaro’s argument relating
20 to the technical problem solved by the asserted claims, which resulted in the Court’s manifest
21 failure to consider material facts and dispositive legal arguments presented before entry of
22 judgment.

In particular, as set forth in the ‘325 Patent itself, Barbaro’s Complaint and its Opposition to Niantic’s Motion for Judgment on the Pleadings, the asserted claims of the ‘325 Patent do not claim “removing the disconnect between the user in the real world and a VTE [(virtual thematic environment)],” nor do they simply “integrat[e] information about the real world into a virtual

1 world, i.e., a computer game.” Order at 7:26 to 8:1 (citing Barbaro Response at 16) and 8:18-20.
 2 Rather, claim 1 of the ‘325 Patent requires, among other elements:

- 3 (a) the ***retrieval of information***, from external sources over the internet, said information
 4 including a real-world location of a user,
- 5 (b) the ***integration of the information (i.e., the real-world location of the user) into a 3-D***
 6 **VTE**, and
- 7 (c) ***user interaction with the 3-D VTE*** as a simulated real-world interaction, depending on
 8 the user's geographical three dimensional movement through the 3-D VTE.

9 Claim 3 further adds to the limitations of Claim 1 that “said information includes real-time
 10 information,” while Claim 6 adds to the limitations of Claim 1 that information is displayed “to a
 11 user in a mini-application within the VTE.” These claimed elements form the inventive system that
 12 provides the inventive concept that satisfies the second step of *Alice* and establishes an
 13 improvement over prior art virtual reality systems by “removing the disconnect between the user in
 14 the real world and a VTE.” Barbaro Response at 16.

15 Under Civil Local Rule 7-9, a party may seek leave to file a motion for reconsideration any
 16 time before judgment. Civ. L.R. 7-9(a). A motion for leave to file a motion for reconsideration may
 17 be made on any one of three grounds. Civ. L.R. 7-9(b)(1)-(3). Barbaro respectfully contends that the
 18 third ground, i.e., “a manifest failure by the Court to consider material facts or dispositive legal
 19 arguments presented before entry of judgment” applies here. Civ. L.R. 7-9(b)(3). The moving party
 20 may not reargue any written or oral argument previously asserted to the Court. Civ. L.R. 7-9(c). See
 21 also *Hopkins v. Bonvicino*, 2011 WL 995961, *1 (N.D. Cal. Mar. 21, 2011) (White, J.)
 22 (unpublished); *School Dist. No. 1J, Multnomah County, Or. v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th
 23 Cir. 1993) (“Reconsideration is appropriate if the district court (1) is presented with newly
 24 discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if
 25 there is an intervening change in controlling law.”). This Motion for Leave to File a Motion for
 26 Reconsideration is based on the record in this case to date.

1 Barbaro has been reasonably diligent in bringing this motion for leave, as required by Civil
 2 L.R. 7-9(b). The Order of which Barbaro seeks reconsideration was filed on May 21, 2020, 12 days
 3 ago, which includes a federal court holiday. The local rule does not specify any particular time
 4 period for filing the motion for leave. However, Barbaro respectfully submits that 12 days is
 5 reasonable when compared, for instance, to 14-day time periods expressly set in other rules
 6 permitting parties to object to or appeal from certain kinds of orders. *E.g.*, Fed. R. Civ. P. 72(a)
 7 (objection to magistrate judge's non-dispositive pretrial orders), 23(f) (petition for permission to
 8 appeal from adverse class-certification order).

9 **I. The Court manifestly failed to consider the material fact that Virtual Worlds is
 10 a term of art that necessarily refers to an environment that is not real, but is
 instead simulated on a computer system.**

11 In the lead up to its ultimate conclusion that the claims of the '325 Patent fail to present an
 12 inventive concept, the Court finds as a matter of fact "that computer games were not the *original*
 13 virtual worlds" because "the concept of building models of real-world locations, and integrating the
 14 user's location into said models, long predates computers." Order at 8:20-22 (emphasis in original).
 15 After reciting several exemplary "virtual worlds," ("architectural models of real-world locations,
 16 'miniature towns' displayed at town halls or museums, board games based on world maps, or 'sand
 17 tables' used by the military") the Court asserts that "each of these virtual worlds has historically
 18 allowed user interaction via 'avatars' placed within the model or map." *Id.* at 8:26 to 9:3. While it
 19 may seem that Niantic argued in its Reply that replicas of real-world locations were the original
 20 virtual worlds [Dkt. 121 at 4:12-24], it did not. Rather, Niantic has always recognized that virtual
 21 environments are necessarily computer-based. In its Responsive Brief on Claim Construction,
 22 Niantic specifically asserted that "[v]irtual environment' is a term of art that refers to an
 23 environment that is not real, but is instead simulated on a computer system." Dkt. 90 at 14:19-20
 24 (citing Dkt. 85-2, Wolfe Decl. ¶ 46; see Ex. A, Rosenberg Tr. 21:7-12). Thus, contrary to the Court's
 25 Order, by definition, problems associated with virtual [thematic] environments **do necessarily**
 26 **address** uniquely technical problems with computers.

1 **II. The Court oversimplified Barbaro’s asserted patent claims and, as a result,
2 failed to consider material facts causing it to misapply Alice.**

3 The Court begins its analysis of Step Two of *Alice* by claiming that “Barbaro argues the
4 claims here necessarily present an inventive concept because they solve a uniquely technical
5 problem: integrating information about the real world into a virtual world, i.e., a computer game.”
6 Order at 8:18-20. But that is, at best, an oversimplification of Barbaro’s argument¹ that manifestly
7 ignores the rest of the elements of the asserted patent claims in direct contravention of the *Alice*
8 requirement to consider all of the elements of a claim, individually and as an ordered combination,
9 when performing Step Two. 573 U.S. 208, 211 (2014). As a result of its oversimplification of the
10 asserted claims, the Court failed to consider the claims as a whole, and as a result, failed to consider
11 the entirety of the record and dispositive legal arguments before it.

12 In particular, the Court’s Step Two analysis revolves around an analogy between the
13 placement of an ““avatar”² into tangible “architectural models,” “miniature towns,” “board games”
14 or “sand tables” and movement of that “avatar” within those tangible models, on the one hand
15

16

17 ¹ After noting that the invention of the ‘325 Patent solved a particularly technical computer
18 problem, Barbaro also specifically noted that asserted Claim 1 provided a solution to that problem
19 by disclosing and claiming:

20 a novel system to **retrieve a user’s real-world geographic location** from
21 sources external to the claimed system. **The retrieved information is**
22 **integrated into a . . . 3-D VTE . . .** such that the 3-D VTE includes said
23 real-world geographic location displayed to the user, thereby **enabling the**
24 **user’s simulated real-world interaction**, depending on the user’s
geographical three-dimensional movement through the 3-D VTE.

25 Dkt. 120 at 1:4-9 (internal citations omitted). Barbaro further noted that Claim 3 further adds to the
26 limitations of Claim 1 that “said information includes real-time information” while Claim 6 adds to
27 the limitations of Claim 1 that information is displayed “to a user in a mini-application within the
VTE.”

28 ² The use of the term “avatar” in conjunction with physical models is incorrect. An “avatar” is
defined by Webster’s Dictionary, in its most pertinent form, as “an electronic image that represents
and may be manipulated by a computer user (as in a game).” (See Exhibit A, attached hereto).

1 (Order 8:20-9:3), with the integration of a user's real-world geographic location³ into a 3-D VTE
 2 and interaction of that user "with the 3-D VTE as a simulated real-world interaction, depending on
 3 the user's geographical three-dimensional movement through the 3-D VTE" on the other. Setting
 4 aside the failure of the Court's analogy to address the geographic location retrieval, real-time
 5 information, and mini-application elements of the claims, in relying on this analogy, the Court has
 6 applied meanings to the claim terms "integration" and "user interaction" that are not supported by
 7 the record.

8 In fact, while the Order is not clear on which "architectural models," "miniature towns,"
 9 "board games" or "sand tables" were being referenced by the Court, Niantic cited Wikipedia for
 10 examples of the last three for the first time in its Reply. Dkt. 121 at 4:25-28. Setting aside the fact
 11 that Wikipedia is not part of the pleadings, all four examples (downloaded from Wikipedia on June
 12 1, 2020 and attached hereto as Exhibits B, C, D, and E, respectively) do not appear to provide the
 13 "integration" and "user interaction" required by the asserted claims of the '325 Patent. Moreover,
 14 these examples highlight the impossibility of placing a user within a pre-computer tangible model at
 15 the user's real-world geographic location, in real-time, and displaying the real-world geographic
 16 location of the user in a mini-application within the 3-D VTE as required by the asserted claims of
 17 the '325 Patent.

18 Thus, even if the Court could find on the record for the Motion for Judgment on the
 19 Pleadings that problems associated with virtual environments are not uniquely technical, none of the
 20 "virtual worlds" cited by the Court (*viz.* "architectural models," "miniature towns," "board games"
 21 or "sand tables") provided claimed "integration" or "user interaction" elements as those terms are
 22 used in the asserted claims of the '325 Patent.

23
 24
 25
 26 ³ According to this Court's claim construction order, "real-world geographic location" means "the
 27 non-relative, actual location in the physical world." Dkt. 85 at 2:13-15.

1 **A. The relationship between pre-computer plastic figurines and tangible models could not**
 2 **provide the claimed requirement of “integrating said information into the 3D VTE”.**

3 The Parties did not define the term “integrating [said information into the 3-D VTE]” during
 4 the claim construction proceedings. We know, however, from the language of Claim 1 that such
 5 “integration” must result in “the three-dimensional virtual thematic environment includ[ing] said
 6 real-world geographic location displayed to the user as said three-dimensional virtual thematic
 7 environment.” ‘325 Patent at 42:48-52. The specification further teaches us about the meaning of
 8 “integration,” through its discussion of the following, among other things (emphasis added):

9 [T]he virtual thematic environment can interface with a GPS system, which will
 10 show the user a map showing the user's (or any other) location, and provide details
 11 down to street and house. The program will allow the user to view either real world
 12 satellite maps/street photographs, etc., or a virtual representation of the same,
 13 showing buildings, grounds, landmarks etc. The user, in a tie-in with the product
 14 placement and other information, can “hot click” on a building, for example, and
 15 information, such as description, telephone number, directions, sponsored
 16 information etc., can be provided on that building.

17 **In other integrations** between real world and virtual world environments which take
 18 place in real time, real time data is downloaded by the program and provided to the
 19 user in the virtual, [sic] environment. For example, real time information, such as
 20 sports scores, stock prices, and auction information, can be provided in an
 21 appropriate manner in the virtual thematic environment (i.e., on TV screens,
 22 computer screens, by cell phone etc.). In addition, the program allows real time video
 23 to be received and viewed in the virtual environment, such as TV programs, sports
 24 games, film concerts, etc., from satellite and cable systems. Thus, in an integration of
 25 real world and virtual world environments, the user may enter a room where he can
 26 “hot click” on a radio, for example, and choose a particular radio station, and the
 27 program will allow real-time audio of that radio station to play for the user. (9:17-42)

28 In another embodiment of the holographic application, a **GPS system may be**
 29 **connected to the computer software** of the present invention, **which would allow**
 30 **the user to see a change in environment as the user physically “walks” or moves**
 31 **a 3D representation (i.e., avatar) through the environment.** The program may
 32 initiate automatic updates to change the environment viewed by the user, as
 33 appropriate. **The GPS system can be provided in all applications for the user to**
 34 **access, as stated above, whether in a thematic environment on a computer**
 35 **screen,** or in a holographic application. (10:43-52)

36 Thus, integrating the real-world geographic location of a user into the 3-D VTE means interfacing
 37 with the external source of real-world geographic location to display virtual representations of the
 38

1 nearby buildings, grounds, landmarks, etc. such that the user would see a “change in environment as
 2 the user physically ‘walks’ or moves [an avatar] through the environment.” *Id.* at 10:46-48.

3 However, the “architectural models,” “miniature towns,” “board games” or “sand tables” of
 4 record are incapable of interfacing with an external source to obtain the real-world geographic
 5 location of the user. Putting that aside and taking the record in the light most favorable to the non-
 6 movant Barbaro, even where the architectural models and miniature towns are in exceptionally
 7 close proximity to the real-world geographic location they model they still fail to provide the user’s
 8 actual “non-relative, actual location in the physical world.” Dkt. 85 at 2:13-15. Moreover, even
 9 assuming that a user could move a figurine through the model/miniature town, there would be no
 10 change in environment.

11 **B. The relationship between pre-computer plastic figurines and tangible models could not
 12 provide the claimed requirement of a “user interacts with the 3-D VTE as a simulated
 13 real-world interaction”.**

14 Although the Parties did not define the claim term “user interacts,” (see, ‘325 Patent, 42:53-
 15 55), they did agree that the term “simulated real-world interaction” would mean “situation found in
 16 the physical world that is closely mimicked.” Dkt. 85 at 2. With respect to this user interaction, the
 17 ‘325 Patent discloses a number of physical world situations closely mimicked by the inventive
 18 systems, including (emphasis added):

19 [T]he virtual thematic environment can interface with a GPS system, which will
 20 show the user a map showing the user’s (or any other) location, and provide details
 21 down to street and house. The program will **allow the user to view either real world**
 22 **satellite maps/street photographs, etc., or a virtual representation of the same,**
 23 **showing buildings, grounds, landmarks etc.** (9:17-23)

24 The **user may be able to enter a building** in a thematic environment such as a store,
 25 hotel, or museum and can view the surroundings as if walking through the real world
 26 building. (8:44-47)

27 [When the user is “in” a virtual store they may] be able to **choose a DVD or a CD,**
 28 **and make a particular video or musical selection**, and the program will show the
 29 video in the virtual thematic environment and play the audio over the user’s computer
 30 system. (8:54-58; see also, 7:33 (bookstore) and 7:43 (coffee store))

1 **If the avatar enters the store and speaks to a store employee** within the thematic
 2 environment, the GUI transmits the appropriate information entered by the user via a
 3 speech processing means, keyboard, or other input means, and an API, to the AI
 4 library and to the voice libraries of the thematic content for both movement, high
 level action, and the processing of the voice data. The GUI will transmit the
 information to the Thematic/Publishing Logic via an API to contact the Sponsor
 library. (28:21-29)

5 [Interaction] includes experiencing the product itself in the virtual world (i.e., **taking**
 6 **and reading a newspaper from a newspaper machine, or a magazine from a** magazine stand,
 7 **driving an automobile parked on the street, turning on a radio to listen to a particular radio station, typing into a computer, using a PDA,**
 8 **turning on a TV set, flying in or piloting an aircraft, etc.**). (7:56-63; 9:4-8
 (interaction with static photo or poster))

9 the user can compete in real-time . . . with other players. . . . Each player will receive
 10 dynamic content (i.e., information in real time) based on the other players' actions.
 11 For example, the other players may be directed to "**pick someone's pocket**" by
 "grabbing" an object from their competitor, and may gain points by getting to a
 certain location first, by opening and reading certain information first, or by
 "hot clicking" on an item first, to obtain points etc. (9:44-56)

12 Thus, as illustrated above (and elsewhere in its specification), the '325 Patent discloses a plurality
 13 of potential user interactions within a 3-D VTE supported by the claimed invention.

14 The specification also provides detail of the mechanics for providing user interaction with
 15 the 3-D VTE, including (but not limited to) the following (emphasis added):

16 The GUI engine 201 pours in real world content rendered in HTML, XML, RDF,
 17 and/or QIE-rendering format or any content format. The user interacts completely
 18 with the GUI 201. . . . The GUI 201 also interacts or connects to the
 19 Thematic/Application Publishing Logic Libraries 203 and an object oriented
 20 database management system (ODDBM), and/or content management system. **The**
 21 **GUI 201 also has all the data related to the user's manipulation of the selection**
 22 **means, including any keyboard strokes, use of a pen, joystick, interactive**
 23 **goggles, touch screen, or any other interactive hardware component that would**
 24 **allow the user the ability to move objects, people, etc.** (15:16-29)

22 The server Thematic Application/Publishing/Game state component 262 maintains
 23 the state or information of the play. **If the character moves to the right and stops**,
 24 the Thematic Application/Publishing/Game state component 262 tracks the actual
 25 movements of what it took to make that character move and stop. **If the object is**
 26 **transformed to a different object, the component 262 tracks the steps that it**
 27 **took for that image to be transposed.** The Thematic Application/Publishing/Game
 state component 262 will maintain the exact location of where the thematic
 application is stopped, such that the user can return to this same spot upon the user's
 return to the thematic application. The Thematic Application/Publishing/Game state
 component 262 also maintains the imaging, data, music, voice, film, etc. for that

1 location. However, the content may indeed change depending upon other
 2 users/players/etc. and or the update of information that has been added to or removed
 3 from the main system on the server. (21:57-22:6)

4 Since all the graphics reside in the Digital Content system, the graphics libraries are
 5 ready to accept commands by the user once the user moves, or directs the avatar
 6 to move through the application. The Digital Content library 209 maintains all the
 7 information in a content management database that is utilized when requested by the
 8 GUI 200. (27:7-12)

9 Thus, as the user moves the avatar down the street, the graphics library located in the
 10 Thematic/Publishing Logic Libraries 203 allows for the avatar's simple movements
 11 such as walking, turning etc. In particular, the movement of the avatar/user is
 12 generated by the GUI 200 transmitting data through a standard communications
 13 system 212 to the server 205. The data is transmitted to the QIE 211 which processes
 14 the information and sends the information to the appropriate library for processing.
 15 In this case, it is the Thematic/Publishing Logic Libraries 203 and within this layer,
 16 the Graphics application library, which is connected to the QIE 202 via the APIs
 17 204, for example, for requests for information and processing. (27:45-57)

18 Thus, as the user moves throughout the thematic environment, depending on the
 19 user's access of the music, video, animation, services, etc., each of the API's are
 20 seamlessly connected to the Libraries ready to either re-calculate or utilize whatever
 21 is stored in the Digital Content system or service libraries. The commands or
 22 programming are tightly coupled with each layer and with each service. If the user
 23 selects or touches a poster, for example, the program will connect the user
 24 seamlessly to the internet site that is tied to that component for either purchase,
 25 review, or any other instruction/operation. Upon completing any task at the
 26 sponsored site, the user is then exposed to a point of returning to the thematic
 27 application to continue where they had left the program or application. The entire
 28 thematic application is an integration between the internet (WWW), Business Logic,
 29 Thematic/Publishing Logic, and QIE, and the GUI. The QIE will determine the
 30 actual output as it sends information out to the device to determine its type and to re-
 31 calculate the objects from a viewing perspective to be manipulated to that specific
 32 device. (27:58 - 28:10)

33 The Digital Content library maintains all the information in a content management
 34 database that is utilized when requested by the GUI. All the information in the
 35 content management database includes data, codes, binary files, web content, event
 36 notification, and other information. It may also contain scheduling directions for
 37 when the web site access and identification of where to place the web content or
 38 advertising, e-commerce, video, music, etc are to be placed. (28:12-20)

39 These details (and others set forth in the '325 Patent) would have disclosed to skilled artisans in
 40 2004 the mechanics for implementing improved user interaction in virtual worlds to improve the
 41

1 technology that had always been simulated on computer systems. *Cf. In re Morsa*, 2020 WL
 2 1815749, at *5 (Fed. Cir. Apr. 10, 2020)(claims found invalid because the inventor failed to
 3 “provide technological details concerning how the advertisement features are implemented to
 4 transform an abstract idea into an inventive concept.”).

5 Having walked through the record, it should now be abundantly clear that the “architectural
 6 models,” “miniature towns,” “board games” or “sand tables” of record are incapable of facilitating
 7 “user interaction,” as that term is used in and defined by the ‘325 Patent. Simply put, these “original
 8 virtual worlds” were static and, thus, incapable of providing the “user interaction” defined and
 9 disclosed by the ‘325 Patent.

10 In view of the foregoing and considering the claims as a whole, it should now be readily
 11 apparent that stretching the Court’s analogy to provide even just half the functionality provided by
 12 Claim 1 of the ‘325 Patent, let alone that of Claims 3 and 6, would cause the analogy to breakdown.
 13 Consider, for instance, an architectural model of a house. For a person to even place a figurine in
 14 the model house in that person’s non-relative, actual location in the physical world, would require
 15 the person to be standing in the living room of the house (that was used to make the model), while
 16 holding the model of the house and place the figurine in the model living room of the model house.
 17 Then, to interact with the model “as a simulated real-world interaction, depending on the user’s
 18 geographical three-dimensional movement through the 3-D VTE” would require the person to hold
 19 the model and move the figurine in the model as they themselves move through the house.

20 This is an absurd example, of course. But one that illustrates what would be required for the
 21 asserted “original virtual worlds” to truly be analogous to the asserted claims when considered as a
 22 whole. The resulting absurdity highlights the manifest failure to consider material facts and
 23 dispositive legal arguments in the Step Two *Alice* analysis. On the flip side, this discussion further
 24 highlights Barbaro’s improvement of virtual environments: removing the disconnect between the
 25 user in the real-world and the 3-D VTE by “retrieving information . . . from external sources [about]
 26 a real-world geographic location of [the] user” and “integrating said information into the 3-D VTE”

1 so “that the user can experience a real world environment... which the user can move through in
2 real-time.” These technological improvements of previously computerized-technology provide an
3 inventive concept that satisfies Step Two of *Alice*.

4 **CONCLUSION**

5 For the foregoing reasons, Barbaro requests permission from this Court to file a motion for
6 reconsideration.

7 DATED: June 2, 2020

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1 **CERTIFICATE OF SERVICE**

2 I certify that all counsel of record is being served on June 2, 2020, with a copy of this
3 document via the Court's CM/ECF system.

4 */s/ Jordan A. Sigale*
5 JORDAN A. SIGALE

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